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No. 09-____

IN THE

Supreme Court of the United States

VALERY V. CEASAR,
Petitioner,

v.

NANCY A. NORD, Acting Chairman,
U.S. Consumer Product Safety Commission;
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the temporal proximity between an employee's protected activity and an employer's adverse action is sufficient by itself, without consideration of any related or intervening circumstances, to establish or refute causation when establishing a prima facie retaliation claim under Title VII.

2. Whether employment activities completed pursuant to a settlement agreement, and the time period in which the agreement is in effect, constitute protected activities and are part of an ongoing process for establishing a retaliation claim under Title VII.

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings below other than the parties listed on the cover page of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Valery V. Ceasar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unreported motions hearing held on July 16, 2008, at which The Honorable Roger W. Titus of the United States District Court for the Southern District of Maryland announced his order, is reproduced, in relevant part, in Appendix A. The Fourth Circuit's Per Curiam opinion, affirming the district court's

decision, is available at 332 F. App'x 98, 2009 WL 2585668 (4th Cir. Aug. 20, 2009)[1] and is reproduced in Appendix B.

JURISDICTION

The United States District Court for the Southern District of Maryland entered its judgment and opinion dismissing Petitioner's Complaint on July 18, 2008. (Tr. 67-76.) The United States Court of Appeals for the Fourth Circuit adopted the reasoning and affirmed the decision of the district court on August 24, 2009. *Caesar v. Nord*, No. 08-1900, 2009 WL 2585668 (4th Cir. Aug. 24, 2009). This Court has jurisdiction to review cases from the court of appeals pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

This petition arises generally under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e (hereinafter "Title VII" or "the Act"). The petition focuses specifically on § 2000e-3(a) of Title VII, which provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The relevant text of Title VII is reproduced in Appendix D.

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[1] On Petitioner's application, dated October 27, 2009, The Honorable Chief Justice John G. Roberts, Jr. by order dated November 22, 2009, extended the filing deadline of this petition to January 21, 2010.

STATEMENT OF THE CASE

Valery Ceasar ("Ceasar"), an African-American female and employee of the United States Consumer Product Safety Commission (CPSC), filed a civil complaint against CPSC in the United States District Court for the Southern District of Maryland on October 1, 2007.[2] *See* App. E. Ceasar alleged race- and sex-based employment discrimination in addition to retaliation. Ceasar sought relief in the form of a promotion, training benefits, and compensatory and other damages.

The district court granted CPSC's motion to dismiss or in the alternative, motion for summary judgment on all six counts alleged by Ceasar. Regarding Counts One and Two, alleging retaliation in the form of a false reprimand and discriminatory treatment by CPSC, the district court concluded that both counts were barred because they arose out of the two settlement agreements that Ceasar and CPSC entered into following separate Equal Employment Opportunity (EEO) complaints. As to Count Three, alleging retaliation and discrimination by CPSC for failure to promote Ceasar, the district court concluded that too much time had passed between Ceasar's last protected activity—execution of the second settlement agreement—and the denial of the promotion, to establish the causal relationship required to sustain a retaliation claim. Furthermore,

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[2] A "Notice of Substitution" Order was entered on February 28, 2008, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(d), in which the United States of America was substituted as the party-Defendant for individual Defendant Marc Schoem, with respect to the tort claims pleaded in Counts Four, Five, and Six of Ceasar's Complaint.

the court found that the plaintiff did not sufficiently refute CPSC's proffered nondiscriminatory reasons for denying Ceasar her sought after promotion.

The district court granted CPSC's motion on Counts Four and Five, entitled "Retaliation and Reprisal, Fraud, and Malicious Abuse of Process" and "Retaliation and Reprisal, Malicious Abuse of Process, Business Defamation," respectively, for failure to fully comply with Rule 10(b) of the Federal Rules of Civil Procedure, which requires that each claim be stated in a separate count. Furthermore, any tort claims for fraud or malicious abuse of process were precluded as a matter of law because the United States did not consent to suit, and the exclusive means of recovery for such claims is under Title VII.

Lastly, CPSC's motion was granted on Count Six, entitled "Retaliation, Reprisal, Malicious Abuse of Process," due to the absence of a temporal relationship between the alleged false investigation and Ceasar's protected EEO activity. The district court concluded that the temporal relationship was so attenuated that a prima facie case could not be established. *See* App. A.

The United States Court of Appeals for the Fourth Circuit adopted the reasoning of and affirmed the district court's decision. *See* App. B (*Caesar v. Nord*, No. 08-1900, 2009 WL 2585668 (4th Cir. Aug. 24, 2009)). Both courts erred as a matter of law in refusing to consider surrounding circumstances beyond temporal proximity as evidence of Ceasar's retaliation claims. In so doing, the Fourth Circuit chose a side in a long-standing three-way split among federal circuit courts, which includes the First, Second, Ninth, and D.C. Circuits that consider temporal

proximity alone for purposes of proving a retaliation claim; the Third, Fifth, Seventh, Eight, Tenth, and Eleventh that consider circumstantial evidence beyond temporal proximity to evaluate causation; and the Sixth Circuit that vacillates between both approaches in Title VII retaliation claims.

This three-way split is neither new nor inconsequential.[3] This Court has long recognized that Title

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[3] Numerous legal commentators have long recognized the circuit split and the circuits' various resolutions to this issue. *See, e.g.*, Troy B. Daniels & Richard A. Bales, *Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII Retaliation Cases*, 44 Gonz. L. Rev. 493, 494, 508 (2009) ("[T]he federal circuits are split regarding the weight of this evidence [of temporal proximity] when the [ ] time frame at issue falls between the[ ] two extremes."); Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, The ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 Mo. L. Rev. 115, 117 (1998) ("[O]ne of the numerous rifts dividing the United States circuit courts . . . includes the evidence necessary to give rise to an inference of causation in a prima facie case of retaliation . . . ."); Rhea Gertken, Note, *Causation in Retaliation Claims: Conflict Claims Between the Prima Facie Case and the Plaintiff's Ultimate Burden of Pretext*, 81 Wash. U. L.Q. 151, 153-59 (2003) ("A split in the circuits has developed surrounding all three elements of the prima facie case[, including] . . . the issue of temporal proximity in relation to the causation element of the prima facie case. . . . While some Circuits rely on temporal proximity to show a causal connection in the prima facie case, other courts rely on other factors and find that temporal issues do not raise an inference of causation."); *id.* at 153 n.14 (referencing Second and Third Circuit cases that acknowledge the inter-circuit split concerning the establishment of causation by temporal proximity in retaliation claims); Justin P. O'Brien, Note, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. Rev. 741, 743 (2002) ("[C]ourts have not adopted consistent standards for weighing temporal proximity evidence. As a result, temporal

VII is an important remedial statute that "assure[s] equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . ." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). This Court has also noted that under Title VII, "a primary purpose of [the] anti-retaliation provisions" is "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Yet, because "[t]o date, the Supreme Court has not directly addressed the evidentiary value of temporal proximity in a Title VII retaliation case or resolved the current split of authority surrounding temporal proximity,"[4] the circuits' conflicting uses of temporal proximity evidence have frustrated Title VII's remedial purpose. Absent a clear rule on the role of temporal proximity in assessing causation, the current state of Title VII retaliation jurisprudence makes it difficult for employers to remedy workplace grievances and for employees to seek redress for retaliation.

REASONS FOR GRANTING THE WRIT

In a Title VII retaliation claim, an employee must establish "by the preponderance of the evidence a prima facie case of discrimination." *Texas Dep't of*

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proximity is not given the same weight among courts, nor even, on occasion, in different cases within the same jurisdiction."); Carrie B. Temm, Comment, *Third-Party Retaliation Claims: Where to Draw the Line*, 54 U. Kan. L. Rev. 865, 869 (2006) ("The spans of time allowed to show causation by temporal proximity vary [across jurisdictions]; periods of one day, one week, two weeks, and fifteen months have been sufficient, but one year and ten years have been insufficient.").

[4] Daniels & Bales, *supra* note 3, at 496.

Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). If a prima facie claim is established, the burden shifts to the employer to provide "a non-discriminatory reason" for the adverse action. *Burdine*, 450 U.S. at 253 (citing *McDonnell Douglas*, 411 U.S. at 802). If the employer meets this test, the burden shifts back to the employee to prove, by a preponderance of evidence, that the employer's adverse employment action was a pretext to conceal unlawful discrimination. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804).

An employee establishes a prima facie claim of retaliation by showing: "(1) she engaged in a protected activity; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took adverse employment action against the plaintiff . . . ; and (4) there was a causal connection between the protected activity and the adverse employment action . . . ." *Tuttle v. Metro. Gov't of Nashville*, 474 F.3d 307, 320 (6th Cir. 2007) (citation omitted). The last element may be satisfied by proving "temporal proximity," which requires "sufficient evidence from which an inference can be drawn" that a "causal connection" exists between an adverse employment action and the employee's protected activity to the extent that the adverse employment action would not have ensued but for the employee engaging in a protected activity. *Singfield v. Akron Metro Hous. Auth.*, 389 F.3d 555, 563 (6th Cir. 2004); *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

This Court, in *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001), observed that very close temporal proximity could constitute sufficient

evidence to establish a prima facie causal connection. Accordingly, it found that a twenty-month period between a protected activity and an act of alleged retaliation was, by itself, too long to suggest causation. *Id.* at 274. However, determining a consistent method for calculating the length of time necessary for establishing a prima facie case, identifying circumstances under which temporal proximity alone suffices to establish causation, and determining how much weight temporal proximity should be given, are issues *Breeden* left unresolved.[5] In the absence of a clear directive from this Court, a deep, long-standing, and growing split has developed among the lower federal courts on the key question of how much weight to afford "temporal proximity," as an evidentiary fact, in assessing the causal relationship between an employee's participation in a protected activity and an employer's adverse employment action. *Id.*

I. THE FEDERAL CIRCUITS ARE SPLIT ON THE QUESTION OF WHETHER TEMPORAL PROXIMITY BETWEEN AN ADVERSE ACTION AND A PROTECTED ACTIVITY ALONE IS SUFFICIENT, AS A MATTER OF LAW, TO ESTABLISH PRIMA FACIE CAUSATION IN A TITLE VII RETALIATION CLAIM.

The circuits are divided among three approaches to the application of temporal proximity. The First, Second, Fourth, Ninth, and D.C. Circuits consider temporal proximity alone to determine causation. The Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits require circumstantial evidence in addition to temporal proximity. The Sixth Circuit

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[5] *See, e.g.*, O'Brien, *supra* note 3, at 750.

has its own intra-circuit split between both approaches.

A. The First, Second, Fourth, Ninth, and D.C. Circuits Consider Temporal Proximity Alone to Determine Causation.

The First, Second, Fourth, Ninth, and D.C. Circuits consider temporal proximity alone, without any circumstantial evidence, in determining whether a causal connection exists between a plaintiff's protected activity and a defendant's adverse employment action. *See Feingold v. New York*, 366 F.3d 138, 156-57 (2d Cir. 2004) (finding two weeks sufficient); *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 25-26 (1st Cir. 2004) (one month sufficient); *Singletary v. District of Columbia*, 351 F.3d 519, 525 (D.C. Cir. 2003) (one month sufficient); *King v. Rumsfeld*, 328 F.3d 145, 151 & n.5 (4th Cir. 2003) (two months and two weeks sufficient); *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001) (twenty days sufficient); *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (citing *Miller v. Fairchild Indus., Inc.*, 885 F.2d, 498, 505 (9th Cir. 1989) (forty-two days and fifty-nine days sufficient)).

These circuits accept the notion that an employer taking an adverse action immediately subsequent to a protected activity is, by itself, sufficient evidence to infer a retaliatory motive. While some nuance may exist between the manner in which these circuits apply their respective temporal proximity rules, all generally conclude that temporal proximity alone is per se indicative of a causal link.

The First Circuit holds that when an adverse action "follows hard on the heels" of a protected activity, a short lapse of time is strongly suggestive of

retaliation. *Noviello v. City of Boston*, 398 F.3d 76, 86 (1st Cir. 2005). For example, the plaintiff in *Mariani-Colon v. Department of Homeland Security ex rel. Chertoff*, 511 F.3d 216, 224 (1st Cir. 2007), was terminated two months after he contacted his employer's human resources department and the Equal Employment Opportunity Commission (EEOC) to report alleged discrimination. The First Circuit concluded that the time frame alone was sufficient to establish causation. *Id.*

The Second Circuit also holds that a causal connection between a protected activity and an adverse employment action exists only when close temporal proximity is present. For example, in *Feingold*, 366 F.3d at 156, a Jewish judge filed a retaliation claim after he was fired shortly after his complaints of racial and religious discrimination. The court found sufficient causation simply because the plaintiff's termination occurred two weeks after his first complaint. *Id.*

Moreover, the Second Circuit employs the same approach to temporal proximity in cases with a longer time lapse. In *Chamberlin v. Principi*, 247 F. App'x 251, 254 (2d Cir. 2007), the court considered a five-month lapse between the protected activity and the adverse action too long to infer causation. The plaintiff sued his employer because he was assigned to a different unit after he filed complaints with the EEOC. *Id.* at 253. The court, refusing to consider the plaintiff's evidence of the employer's pattern of exclusionary behavior, dismissed the plaintiff's claim for lack of causation solely based on the five months between the complaints and the undesirable assignment. *Id.* at 254.

Much like the aforementioned circuits, the Fourth Circuit only considers temporal proximity when evaluating causation. In *Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261, 265-66 (4th Cir. 2001), the plaintiff alleged employer retaliation for its failure to promote her as a result of her participation in a sexual harassment investigation. The Fourth Circuit ruled that because the plaintiff's non-promotion occurred within a short time of her participation in the investigation, she established prima facie causation. *Id.* at 271.[6]

The Ninth Circuit also considers temporal proximity alone in determining prima facie causation in a Title VII retaliation case. In *Passantino*, the court affirmed the trial court's finding that the approximately two-month period between the plaintiff's complaint of sex discrimination and several adverse

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[6] While the Fourth Circuit has adopted the temporal proximity alone approach, paradoxically, it has created an exception to this approach by taking into account case-specific circumstances. In *King v. Rumsfeld*, 328 F.3d 145, 148 (4th Cir. 2003), the plaintiff claimed retaliation when he was terminated subsequent to filing an EEOC complaint against his supervisor. The court determined that the plaintiff demonstrated prima facie causation because he was terminated two months and two weeks after his supervisor learned of the complaint. However, the court mentioned that this length of time typically would not establish causation. *Id.* at 151 n.5. The court made an exception, however, because the plaintiff was hired for a probationary period of two years, at the conclusion of which his supervisors would have decided termination or permanent employment of the plaintiff. *Id.* Because his supervisors chose to terminate him before the end of the probationary period, the court concluded that temporal proximity was sufficiently close. *Id.* Therefore, although the Fourth Circuit adopts a general rule of temporal proximity alone, it considered, at least in *King*, circumstances beyond time to decide causation.

employment actions was a sufficient basis for a jury to find causation. 212 F.3d at 507. The court only used evidence of the time that elapsed between the complaint and the adverse actions to substantiate the causal link between the events. *Id.*

Employing the same approach, the Ninth Circuit ruled in the defendants' favor on the issue of causation based on the long lapse in time between an alleged protected activity and an adverse employment action in *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002). Since one-and-a-half years separated the complaint and the termination, the court held that the plaintiff did not establish causation. *Id.* In its opinion, the court referred to a Seventh Circuit case to establish that "a nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation." *Id.* (citing *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir. 2000)). However, unlike the Seventh Circuit's ruling, which took into account circumstantial evidence other than temporal proximity, the Ninth Circuit only used the time lapse between the plaintiff's internal complaint and his termination to find that there was no causal link. *Paluck*, 221 F.3d at 1010.

Lastly, the D.C. Circuit employs a temporal proximity alone approach in determining causation. In *Singletary*, the plaintiff claimed retaliation for filing complaints against his employer based on racial and disability discrimination. 351 F.3d at 523. The district court initially rejected the plaintiff's retaliation claim for lack of causation, citing the remote proximity of three years. *Id.* at 524. The D.C. Circuit, however, remanded the causation issue to

the district court for consideration of the plaintiff's later actions, which could be considered protected activities that the district court previously failed to consider. These possible protected activities occurred two months prior to the denial of plaintiff's promotion. *Id.* The D.C. Circuit's remand was not based on any consideration of other circumstantial evidence, but on the occurrence of events that would alter the amount of time between a protected activity and the adverse employment action. *Id.* at 525.

B. The Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits Consider Circumstantial Evidence Beyond Temporal Proximity to Determine Causation.

The Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits are "temporal proximity plus" circuits, which reject the idea that temporal proximity alone is conclusive proof of causation in Title VII retaliation claims. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 232-33 (3d Cir. 2007); *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 807-08 (5th Cir. 2007); *Lang v. Ill. Dep't of Children & Family Servs.*, 361 F.3d 416, 419 (7th Cir. 2004); *Bradley v. Widnall*, 232 F.3d 626, 633 (8th Cir. 2000). While these "temporal proximity plus" circuits differ slightly on the type of contextual evidence necessary to prove causation and the standards applied to evaluate the evidence, they all agree on the need to consider various types of circumstantial evidence indicative of retaliatory animus, in addition to temporal proximity. *See Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chi.*, 104 F.3d 1004, 1015 (7th Cir. 1997).

In *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 n.5 (3d Cir. 2000), the Third Circuit noted that "temporal proximity and causation need to be assessed with the understanding that the relative evidentiary impact of temporal evidence may vary depending upon the stage of the *McDonnell Douglas* proof analysis, and the procedural circumstance." The court further cautioned that each case must therefore be considered "with a careful eye to the specific facts and circumstances encountered." *Id.* "[A] discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990). Furthermore, the Third Circuit recognized that timing alone may be sufficient to establish a causal link, but only where the timing of the alleged adverse action is "unduly suggestive." *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997); *Farrell*, 206 F.3d at 280.

Conversely, in *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892, 895 (3d Cir. 1993), the Third Circuit upheld the district court's finding of retaliation, despite the lack of temporal proximity between the protected activity and retaliatory actions. The court focused on facts that occurred soon after the plaintiff's initial complaints and continued until his discharge, including: constant written and verbal warnings, inaccurate point totaling in performance assessments, and disciplinary actions. *Id.* According to the Third Circuit, this pattern of behavior was retaliation for plaintiff's Title VII complaint. *Id.*

Assessing causation on a case-by-case basis, the Seventh Circuit similarly evaluates temporal proximity along with additional evidence, on the theory

that a strictly applied timeframe frustrates Title VII's purposes. *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 616 (7th Cir. 2001). Additionally, this circuit recognizes that while timing may provide a pertinent clue to causation, it does not, by itself, eliminate the need to show causation. *Bermudez v. TRC Holding, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998). Otherwise, every employee would file a frivolous charge just to obtain some benefit. *Id.* Thus, as the temporal proximity between a plaintiff's protected conduct and an employer's adverse action increases, the likelihood that a causal link exists between the two events decreases, absent other evidence to support the inference. *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 485 (7th Cir. 1996).

For example, in *Davidson v. Midelfort Clinic Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998), the Seventh Circuit held that a period of five months between a discharge and an initial claim of discrimination was insufficient to create a causal link between the two events. In so holding, the court noted that a causal connection between the employer's conduct and protected activity did not exist merely because the discharge occurred subsequent to an EEOC charge. *Id.* Rather, causation could be shown based on the short time period between the complaint and retaliation, plus the increased discipline the plaintiff faced, the unsubstantiated attendance violations, and the plaintiff's prior flawless five-year employment record. *Lang*, 361 F.3d at 421.

Similarly, the Fifth Circuit notes that close timing between an employee's protected activity and an alleged retaliatory action may, but not does not automatically, provide the causal link necessary to make a prima facie case of retaliation. *Swanson v.*

Gen. Servs. Admin., 110 F.3d 1180, 1188 (5th Cir. 1997). Like the Seventh Circuit, the Fifth Circuit recognizes the inherent dangers in considering temporal proximity alone to establish causation. *Evans v. Houston*, 246 F.3d 344, 345 (5th Cir. 2001). Specifically, if timing alone were enough, any action taken against an employee could be considered discriminatory, regardless of the lack of circumstantial evidence to support such an inference. *Id.* at 1189. Such a rule would unnecessarily tie the hands of employers, as employers are sometimes forced to terminate employees with poor performance or improper work conduct or who are otherwise disruptive. *Strong*, 482 F.3d at 808; *see also Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002) (holding that a five-month gap between the protected activity and alleged retaliation was insufficient to prove causation absent other evidence of retaliation).

Like the Third, Fifth, and Seventh Circuits, the Eighth Circuit holds that the appropriate treatment of temporal proximity depends on the context of each case. *Hudson v. Norris*, 227 F.3d 1047, 1051 (8th Cir. 2000); *see also Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1045 (8th Cir. 2000) (holding temporal proximity of thirteen days insufficient to show causation when plaintiff's misconduct is an intervening factor in termination); *Kiel v. Select Artificials, Inc.*, 221 F.3d 1131, 1136 (8th Cir. 1999) (finding no causation where plaintiff exhibited insubordinate behavior between protected activity and termination).

For example, in *Hudson*, the plaintiff alleged that his employer retaliated against him because he testified in a co-worker's lawsuit against the employer. 227 F.3d at 1049-50. Within four months of testifying,

the plaintiff's employer subjected him to two internal affairs investigations and denied him a promotion, among other adverse actions. *Id.* at 1051. The Eighth Circuit acknowledged that temporal proximity is generally not enough to establish a prima facie retaliation case; however, it found the four-month time period in this particular case sufficient evidence to infer causation. *Id.*

The Tenth Circuit also considers evidence beyond mere temporal proximity to determine whether a plaintiff has demonstrated the requisite causal nexus in her prima facie case. In *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999), the court stated that causation can be demonstrated by close temporal proximity between a protected activity and an adverse action; however, if these events are not "very closely connected . . . the plaintiff must rely on additional evidence beyond temporal proximity to establish causation."[7]

The Tenth Circuit's application of the temporal proximity plus standard is clearly illustrated in *O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248 (10th Cir. 2001). In *O'Neal*, the defendants claimed that O'Neal's retaliation claim was legally insufficient because he experienced the adverse action of reduced work hours ten months after filing a claim of racial discrimination with the EEOC. *Id.* at 1252. The plaintiff, however, presented evidence that his duties were systematically reassigned to other work-

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[7] While *Anderson* involves a plaintiff claiming retaliation in response to an EEOC complaint of disability discrimination under the Americans with Disabilities Act, the prima facie retaliation case is made under the same *McDonnell Douglas* framework that applies to Title VII retaliation cases. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999).

ers during that ten-month period and that the reassignment was less efficient than when he completed the tasks. *Id.* at 1253. The Tenth Circuit concluded that the reassignment of work could be considered a precursor to the reduction of hours, providing a causal link between O'Neal's EEOC complaint and his reduction of hours. *Id.*

The Eleventh Circuit also accepts the notion that it is possible to infer causation from evidence besides temporal proximity. The court found that when "there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails" unless there is "other evidence tending to show causation." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007). In *Thomas*, the plaintiff asserted that her employer terminated her three months after she alleged sexual harassment by her supervisor. *Id.* at 1363. Because Thomas did not offer any evidence to supplement a relatively long temporal proximity, the Eleventh Circuit held that a three-month period was insufficient to establish causation. *Id.* at 1364.

Similarly, in *Embry v. Callahan Eye Foundation Hospital*, 147 F. App'x 819, 830 (11th Cir. 2005), the Eleventh Circuit found a nine-month period between the plaintiff's protected activity and the adverse action insufficient. The court specifically mentioned that the plaintiff offered no other evidence that exhibited a "pattern of retaliatory acts," together with temporal proximity; therefore, it ruled that the temporal proximity alone failed to suggest a causal link. *Id.* at 831.

In short, despite variations in the standards employed and the type of contextual evidence considered by each circuit, these circuits agree that

temporal proximity alone is insufficient proof of but-for causation.

C. The Sixth Circuit Is Split Between "Temporal Proximity Alone" and "Temporal Proximity Plus" Approaches to Evaluating Causation.

Though seemingly aligned with the "temporal proximity plus" circuits, the Sixth Circuit is divided along an intra-circuit split. The circuit applies both approaches—temporal proximity alone and temporal proximity plus. *See DiCarlo v. Potter*, 358 F.3d 408, 421 (6th Cir. 2004) ("[T]his Circuit has embraced the premise that in certain distinct cases where the temporal proximity between the protected activity and the adverse employment action is acutely near in time, that close proximity is deemed indirect evidence such as to permit an inference of retaliation."). *But see Tuttle*, 474 F.3d at 321 ("The law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim.").

Nguyen is the seminal "temporal proximity plus" decision of the Sixth Circuit. 229 F.3d at 562. *Nguyen* involved a city employee who filed an EEOC complaint alleging discrimination after receiving, what he considered, an inadequate pay increase with his promotion. *Id.* After his employer denied him numerous subsequent promotions, Nguyen filed another EEOC complaint, including a retaliation claim and arguing that temporal proximity evidence alone was sufficient to show causation. *Id.* The Sixth Circuit rejected Nguyen's claim, concluding that no one factor is dispositive in establishing causation. *Id.*

And yet, in *DiCarlo*, the Sixth Circuit adopted the seemingly irreconcilable temporal proximity alone approach. 358 F.3d at 421. There, a former probationary postal worker sued under Title VII, alleging that his termination was discriminatory and retaliatory, in that it stemmed from his former EEO complaint against his employer alleging discrimination on the basis of his age, national origin, and disability. *Id.* at 413-14. The Sixth Circuit held that the twenty-one days between DiCarlo's termination and his EEOC complaint was, by itself, "significant enough to constitute indirect evidence of a causal connection so as to create an inference of retaliatory motive." *Id.* at 422.

Most recently, the Sixth Circuit has attempted to reconcile its double-sided position on temporal proximity, explaining:

> Although we acknowledge . . . that some confusion in the case law exists on this issue, the two lines of cases are fully reconcilable. Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation. But where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.

Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 525 (6th Cir. 2008) (internal citations and quotation marks omitted). In other words, the circuit vacillates

between a temporal alone and a temporal plus standard based entirely on whether the protected activity and the retaliation are "very close" in time, even though the Circuit—and no other lower federal court for that matter—has ever explained, much less agreed upon, the meaning of "very close in time."

D. The Intractable Split Among the Circuits When Evaluating the Weight of Temporal Proximity Evidence Cannot Be Resolved Without This Court's Intervention.

The intractable split among the circuits is ripe for resolution by this Court for at least three reasons. First, without clear guidance from this Court, lower federal courts will continue to misapprehend the appropriate value of temporal proximity evidence. The most obvious example of this misapprehension is, as discussed above, the intra-circuit Sixth Circuit split. *See id.* at 525 ("[C]onfusion in the case law exists on this issue." (quoting *Eppes v. Enter. Rent-a-Car Co.*, No. 05-CV-458, 2007 WL 1170741, at *7 (E.D. Tenn. Apr. 18, 2007))). But even circuits that have seemingly settled on a single standard remain uncertain of the probative value of temporal proximity in retaliation cases. For example, in *Farrell*, the Third Circuit addressed the apparent discrepancy in its prior cases by contending that the split was "not an inconsistency" but rather, an indication that the causation analysis was "essentially fact-based." 206 F.3d at 279. Yet, a more recent case, attempting to make sense of the circuits' precedents, suggests that the uncertainty is ongoing. *See Marriott v. Audiovox Corp.*, No. 04-1307, 2006 WL 3805145, at *16 (W.D. Pa. Dec. 22, 2006) ("The United States Court of Appeals for the Third Circuit has been

somewhat ambivalent with respect to whether timing alone is sufficient to satisfy the causation prong of the prima facie case.").

Second, the conflicting approaches used to evaluate temporal proximity evidence have resulted in inconsistent analysis and holdings, which have subjected similarly situated plaintiffs to wildly disparate applications of the law, depending on the circuit and sometimes, on the court. In some cases, plaintiffs have established a causal connection based on temporal proximity, but in virtually the same temporal circumstances, other plaintiffs have not. *Compare Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999) (two to five months insufficient to show a causal connection), *with Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731-32 (9th Cir. 1986) (two months, alone, sufficient to show causal connection), *and Hochstadt v. Worcester Found.*, 425 F. Supp. 318, 324-25 (D. Mass. 1977), *aff'd* 545 F.2d 222 (1st Cir. 1976) (six months sufficient to show causal connection).

Even more troubling, these inconsistent decisions pervade not only among the circuits, but also within them. *Compare Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 363 (6th Cir. 2001) (three months alone would be *insufficient* to show causal connection), *with Singfield v. Akron*, 389 F.3d 555, 563 (6th Cir. 2004) (three months alone *sufficient* to establish causal connection). The intra-circuit inconsistencies have caused the Sixth Circuit difficulty in deciphering its own precedents. *See Mickey*, 516 F.3d at 523 (citing four cases from the Sixth Circuit that improperly cite

a fifth court's evaluation of temporal proximity evidence).[8]

Perhaps no clearer evidence exists of the inconsistent consequences of the split than in the federal courts' struggle to apply a consistent definition of "very close" and develop a principled basis upon which to rest such a definition.

On one hand, circuits finding temporal proximity sufficient by itself to establish causation tend to define temporal proximity as an adverse action "close in time" to the protected activity or "within a reasonable period of time." *Passantino*, 212 F.3d at 507 ("within a reasonable period of time"); *Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994) ("close in time"); *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001) (defining standard as "closely followed in time"). These courts consider a range of intervals as sufficient temporal proximity evidence to infer causation, from as short as a few minutes to as long as a few months. *See Holava-Brown v. Gen. Elec. Co.*, No. 98-CIV-9661, 1999 WL 642960, at *4 (2d Cir. Aug. 20, 1999) (finding less than three months sufficient); *Wyatt*, 35 F.3d at 16 (finding protected activity and adverse action almost simultaneous).

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[8] The four cases are *Tuttle v. Metro. Gov't of Nashville*, 474 F.3d 307, 321 (6th Cir. 2007), *Dixon v. Gonzales*, 481 F.3d 324, 333-34 (6th Cir. 2007), *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 737 (6th Cir. 2006), and *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 364 (6th Cir. 2001). All four cited *Nguyen*, 229 F.3d 559, for the proposition that "temporal proximity alone may not establish a causal connection." *Mickey*, 516 F.3d at 523. *Mickey*, however, noted that those courts were mistaken and that *Nguyen* observed that there could be circumstances where temporal proximity would be sufficient to establish an inference of retaliation. *Id.* (citing *Nguyen*, 229 F.3d at 567).

On the other hand, circuits that examine temporal proximity evidence plus circumstantial evidence define temporal proximity as being "very close," or conclude that the time between the protected activity and the adverse action is "unusually suggestive" of a causal connection. *See Warren v. Ohio Dep't of Pub. Safety*, No. 00-CIV-3560, 2001 WL 1216979, at *4 (6th Cir. Oct. 3, 2001); *O'Neal*, 237 F.3d at 1253 (finding three months not "very close" and therefore insufficient evidence of temporal proximity, but one and one-half months "very close" and therefore sufficient); *LeBoon*, 503 F.3d at 232 (finding a gap of three months not "unusually suggestive"). Nevertheless, some of these circuits have held that two or three months between the protected activity and retaliation were insufficient to show a causal connection. *See O'Neal*, 237 F.3d at 1253 (three months alone insufficient); *Hafford*, 183 F.3d at 515 (two months alone insufficient).

Finally, this issue is ripe for review because of the widespread emergence and lasting significance of retaliation claims in Title VII litigation. Recently, Justice Samuel Alito acknowledged what studies by the EEOC have long established, namely that there has been an exponential increase in Title VII retaliation claims. *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846, 855 (2009).[9] In virtually every one of these cases, temporal proximity is the linchpin of the claim.[10] Unfortunately, "[c]ourts have taken what

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[9] *See also U.S. Equal Employment Opportunity Commission, Charge Statistics: FY 1997 through FY 2009* (2009), *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (showing that retaliation charges filed with the EEOC nearly doubled between 1997 and 2009).

[10] O'Brien, *supra* note 3, at 748.

began as a straightforward, three-element test for actionable retaliation and turned it into a labyrinth of conflicting decisions and poorly defined required showings." Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 Mo. L. Rev. 115, 151 (1998). Given Title VII's significance in this country's federal civil rights legislation, it is critical that the courts apply a consistent standard to establish causation in a prima facie retaliation claim to further Title VII's primary purpose of "maintaining unfettered access to statutory remedial mechanisms." *Shell Oil*, 519 U.S. 337. Otherwise, "as employees increasingly turn to the retaliation clauses either as independent causes of action or to buttress their discrimination claims, it is likely that the conflicts regarding the elements of retaliation only will compound." Essary & Friedman, *supra*, at 151-52.

E. Ceasar's Case Underscores the Untenable Nature of the Circuit Court that, Depending on the Circuit, Would Likely Produce Drastically Conflicting Outcomes.

1. The Fourth Circuit Erred in Excluding Circumstantial Evidence of Unlawful Retaliation as a Matter of Law.

As mentioned above, the Fourth Circuit is among the group of circuit courts that applies the temporal proximity alone approach. Accordingly, the district court held, and the Fourth Circuit subsequently affirmed, that the materially adverse actions Ceasar encountered were not retaliatory. Thus, the scope of the lower courts' causation analysis was limited to an

assessment of only two basic facts: (1) the fifteen-month time span between the date Ceasar entered into her second settlement agreement with CPSC on October 18, 2004, and the date she was unduly passed over for a promotion on January 23, 2006; and (2) the over one-year gap between the date she filed her third complaint on April 20, 2006, and the date her employer launched the informal investigation against her on July 31, 2007.

Had the jurisdiction been a temporal proximity plus circuit, a complete analysis of the evidence would have included: (1) her failure to promote claim;[11] (2) the baseless nature of the internal investigation; (3) her flawless employment record and strong performance evaluations; (4) repeated harassment designed to isolate her from colleagues and induce discomfort in the workplace, as alleged under Count Six of the Complaint;[12] (5) a diminished

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[11] This disregarded fact becomes all the more prescient when considering that Stern—the white male candidate chosen over Ceasar who is her junior and whom she had trained—was preselected by Schoem during Ceasar's detail to "act" in the ostensibly vacant supervisor position for which Ceasar had applied. *See* App. E; *see also* App. G. Schoem conceded that he altered and left undefined the qualifications for the position that included purely subjective assessments of candidates' "political savvy." App. E at 30a. The record reveals that though a rotation of employees to the position of acting supervisor was the agency's normal practice, Stern was allowed to remain in the position to the exclusion of other employees, a fact that CPSC would later cite as an example of his superior qualifications for the permanent position.

[12] Although the court dismissed Count Six of the Complaint for failure to state causes of action for malicious abuse of process, intentional infliction of emotional distress, and business defamation, the evidence of harassment that produced a hostile work environment in support of these claims—such as

performance review conjured without reason, three days subsequent to the launch of the internal investigation against her; (6) the reduction in her role as team leader on the very day she was denied a promotion; (7) and four requests for training, one of which was flatly denied without reason and three of which never received responses.[13] Furthermore, although the fifteen-month interval between Ceasar's second settlement agreement and her failure-to-promote complaint was considered too attenuated to establish an inference of causation, the lower courts failed to consider the fact that she was detailed for the majority of this period and thus, was far less exposed to retaliatory measures during this time. Moreover, Caesar's former supervisors blatantly ignored the training requests she submitted during this time. Finally, once Ceasar resumed her duties upon the completion of her detail, it took less than five months for her superiors to deny her another training request and nine months to initiate the informal investigation against her.

In fact, it takes only a very small analytic step, rather than any large imaginative leap, to conclude that had the very same set of circumstantial evidence been presented in a temporal proximity plus

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alienating Ceasar from the staff by advising them to stay away from and refrain from communicating with her and failing to respond to Ceasar's repeated requests for training until after a third complaint was filed—still remain properly preserved in the record. App. E at 40a; *see also* App. G.

[13] The failure to respond to Ceasar's requests for training is distinguishable from the denial of training requests. Whereas denial left her with a definitive answer to her requests, the failure to respond left her unsure of the status of her request, such that she was left at an impasse, not knowing whether to wait for a reply or file a timely complaint.

jurisdiction, the outcome of Ceasar's case likely would have been very different.[14] *See Lang*, 361 F.3d at 419-21 (recognizing plaintiff's exemplary employment record and unfounded violations against him as material circumstantial evidence establishing causation, when combined with short time span between events); *Hudson*, 227 F.3d at 1051-52 (noting that, in addition to the unfair denial of a promotion and two internal affairs investigations, "[t]he large number of adverse actions that occurred hard on the heels of the protected activity . . . particularly when juxtaposed with [plaintiff's] previously strong employment record, is significant . . ." in inferring a casual link); *Hunt-Golliday*, 104 F.3d at 1014-15 (finding that a pattern of "criticism and animosity by [plaintiff's] supervisors," following protected activities, supported an inference that employee's protected activity and the employer's adverse acts were linked); *Robinson*, 982 F.2d at 895-96 (recognizing that employer's "set pattern of behavior" permitted the inference of a causal

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[14] To further illustrate this point, the lower courts' predisposition to exclude facts and consider the entire scenario of discriminatory conduct given the "significantly long period of time between the date of the protected activity and the denial of promotion," drastically undercuts Ceasar's rebuttal of CPSC's purported nondiscriminatory reason for not promoting her. App. A at 6a. Indeed, considered in totality, the weight of the excluded facts frames CPSC's reason as dubious at best and casts Schoem's "objectivity" into serious doubt. Notwithstanding the fact that Ceasar's leadership responsibilities were diminished without reason on the very day she learned of her non-promotion, the repeated ignoring and refusal of executive leadership training requests limited Ceasar's ability to become as "objectively" qualified as Stern. Relating the intertwined nature of the omitted facts to the issue of pretext further underscores the subversive nature of the retaliatory conduct against Ceasar giving rise to the overall claim.

link, as demonstrated by circumstantial evidence that employee was subject "to a 'constant barrage of written and verbal warnings . . . , inaccurate performance point totaling, and disciplinary action, all of which occurred soon after plaintiff's initial complaints and continuing until his discharge'").

In using temporal proximity as the sole measure of causation, the Fourth Circuit essentially applied a de facto statute of limitations to bar Ceasar's claims, even though no such bar exists in Title VII. A full consideration of materially relevant facts is warranted because, as the Third Circuit has expressed, "[a] play cannot be understood on the basis of some of its scenes[,] but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Robinson*, 982 F.2d at 895-96 (quoting *Andrews*, 895 F.2d at 1484). Indeed, the excluded facts illustrate an "overall scenario and [are] not individual discrete facts," *Farrell*, 206 F.3d at 279, which, when understood in their entirety, create an inference that Ceasar was subjected to a systematic and pernicious pattern of retaliation that remains unaddressed two settlement agreements and three complaints later.

2. *Only an Evaluation of the Overall Scenario of Retaliation Is Consistent with the Goals of Title VII.*

This Court has stated that one of the main purposes of Title VII is "to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Burlington Indus., Inc. v. Ellerth*, 24 U.S. 742, 763 (1998). The good-faith settlement agreement and its execution are fundamental to achieving this broad purpose. At its core, Title VII

serves not merely to punish employers for discrimination, but also to "'spur or cataly[ze]' . . . employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate . . . the last vestiges of discrimination.'" *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (*quoting Albemarlbe Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)). In this sense, voluntary settlement agreements are congressionally and judicially encouraged to incentivize employers to swiftly redress meritorious employee discrimination claims, while instituting meaningful workplace reforms without the need for judicial intervention.[15]

Only a consideration of all evidence of retaliation would create the incentive for employers to not only enter into, but also carry out, settlement agreements in good faith. While arriving at a voluntary settlement agreement is a necessary first step to acknowledging and addressing discriminatory workplace conduct, the mere existence of the agreement does nothing by itself to actually ameliorate the vestiges of discrimination that Title VII was designed to eliminate. Indeed, nothing prevents employers in half of the nation's circuits, including the Fourth, from discriminating against employees if they wait an extended period of time once a good-faith settlement agreement is entered. As long as evidence of con-

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[15] *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (recognizing Title VII procedures designed "to work towards the resolution of claims through conciliation rather than litigation"); *Alexander*, 415 U.S. at 44 (noting the purpose behind Title VII is to foster "[c]ooperation and voluntary compliance . . . as the preferred means for achieving this goal" in order to facilitate the settlement of disputes "through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit").

tinued discrimination is functionally time-barred from judicial consideration, employers are only "spurred or catalyzed" to act in good faith when entering into a settlement agreement, but not in executing it. This is an implication that Congress surely did not intend. Employees subjected to continuous discrimination are thereby confronted with the onerous options of either quitting their position, continuing their duties in a hostile work environment, resubmitting grievances for further administrative adjudication, or expending personal and judicial resources to enforce settlement agreements. While the latter two options provide limited possibility for redress by virtue of pursuing further adversarial proceedings, the discriminated employee is perpetually exposed to the very retaliatory discrimination and harassment from which Title VII was designed to shield her.

II. THE INCONSISTENT MANNER IN WHICH FEDERAL COURTS CONTINUE TO EVALUATE SETTLEMENT AGREEMENTS AS PROTECTED ACTIVITY SUBSTANTIALLY UNDERMINES THE EFFECTIVENESS OF THE SETTLEMENT PROCESS AND, CONSEQUENTLY, THE OVERALL PURPOSE OF TITLE VII.

Similar to the influence of temporal proximity in establishing causation, the manner in which the courts consider settlement agreements as a protected activity substantially influences the effectiveness of the Title VII settlement process. Evaluating temporal proximity necessarily requires a court to identify the protected activity and to calculate the time between the activity and the retaliatory action. Title VII provides that "[i]t shall be unlawful

employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (2000). Several circuits recognize that "[t]he 'exceptionally broad protection' of th[is] participation clause extends to persons who have 'participated in any manner' in Title VII proceedings." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969)); *see also Slagle v. County of Clarion*, 435 F.3d 262, 266 (3d Cir. 2006); *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1152 (10th Cir. 2008). "Thus, once the activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation." *Booker*, 879 F.2d at 1312.

Despite the "broad protection" espoused by the courts, in the case of settlement agreements, most courts have inadvertently determined that the protected activity ends at the moment the agreement is signed. Thus, for the purpose of establishing the temporal proximity, the starting point is the day agreement is entered into force. The Fourth, Ninth, and Tenth Circuits have taken this approach. *Adams v. Calvert County Pub. Sch.*, 201 F. Supp. 516, 520 (D. Md. 2002) (granting summary judgment in favor of the defendant where two years separated the adverse action and the time the parties "signed" a settlement agreement); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir. 1986) (assessing plaintiffs' prima facie case based on the time between the adverse action and when they "negotiated" the EEOC settlement agreements); *Williams v. Potter*, 316 F. Supp. 2d 1122, 1137 (D. Kan. 2004) (granting

summary judgment for the defendant based on the fact that the "pertinent period" began on "the date when plaintiff signed the settlement agreement").

This practice, however, frustrates the process that Title VII promotes. By looking to the date of the agreement as the beginning and end of the protected activity, courts have neglected to consider any period of time during the performance of the agreement as part of the protected activity. Consequently, courts continue to ignore the critical reality that the internal resolution process of employment discrimination claims begins at the initiation of the agreement and continues throughout its actual implementation. In other words, the intrinsic value of a settlement agreement is worth more than the mere paper on which it is written; rather, it is legislatively encouraged insofar as it is carried out in good faith. It is this process that Title VII values and encourages. Yet, failing to consider the time period extending from the entry through the performance or alternatively, the expiration of the settlement agreement and the conditions fulfilled therein as a single protected activity, undermines the goals of Title VII. Indeed, this approach renders the settlement agreement a mere symbolic procedural gesture, rather than a substantive non-litigation remedy. Simply put, an employee has not stopped participating in the settlement process just because she has signed an agreement; to the contrary, the settlement process is just beginning at this phase.

Thus, for the purpose of calculating temporal proximity, courts should find that the protected activity extends through the point at which the terms of the settlement agreement have been fully performed or the point at which they expire. This

approach is compelled by the text and intent of Title VII, which protects an employee participating "in any manner" in a settlement "proceeding." *See* § 2000e-3(a). Considering the performance phase of a settlement agreement as part of the protected activity creates a mutually reinforcing incentive structure. On the one hand, employees are encouraged to pursue this non-litigation resolution for their grievances, confident that they are fully insulated from retaliation while pursuing a negotiated solution to their employment discrimination claims. On the other hand, employers are compelled to perform the settlement agreement terms in good faith and eradicate the vestiges of discrimination giving rise to the protected activity, since all circumstances of non-compliance can and will be considered in potential adversarial proceedings. The net effect of this approach not only strengthens the efficacy of the settlement process as intended by the drafters of Title VII, but also presents the greatest likelihood of turning back what Justice Alito in *Crawford* characterized as the rising tide of Title VII retaliation claims. 129 S. Ct. at 855.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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January 21, 2010

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MARYLAND

Civil Action: RWT-07-2641

VALERY V. CEASAR,
Plaintiff,

vs

NANCY A. NORD, *et al*,
Defendant.

Wednesday, July 16, 2008
Greenbelt, Maryland

The above-entitled action came on for a Motions Hearing Proceeding before the HONORABLE ROGER W. TITUS, United States District Court Judge, in courtroom 2C at 10:01 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE PROCEEDINGS AS RECORDED AND REQUESTED BY COUNSEL.

APPEARANCES:

On behalf of the Plaintiff:

JOHN F. MERCER, ESQUIRE

On behalf of the Defendant:

NICHOLAS A. OLDHAM, ESQUIRE
MARGARET PLANK, ESQUIRE

* * *

THE COURT: All right. On October 1st 2007, the plaintiff filed a complaint in this court for employment discrimination pursuant to Title 7 of the Civil Rights Act of 2004, as well as certain common law claims that were asserted. The complaint is divided into six counts. I will review those in a moment.

On February 25, 2008, the defendants filed a Motion to Dismiss or in the alternative for summary judgment.

The defendants in this action are Nancy Nord, who is sued in her capacity as Acting Chair of the United States Consumer Product Safety Commission; and the second defendant is Mark Schoem, who is Deputy Director of Office of Compliance and Field Operations.

In connection with the motion that was filed by the defendants on February 25, there was a certification signed by the Department of Justice through Philip Pyles, the Director of the Torts Branch, who certified that he's read the complaint and certified that Mark Schoem was acting within the scope of his employment as an employee of the United States at the time of the incident out of which the claims arose. This is commonly referred to as a "Westfall Certification."

Behind that certification is a Notice of Substitution made by the United States stating that as a result of certification of the "Westfall Certification" that the United States should be substituted with operational law with respect to the complaints asserted—the claims, excuse me, pleaded in Counts Four, Five and Six against the individual defendant, Mark Schoem. Having asked for substitution, the United States has also asked for dismissal on the basis that the claims, the tort claims that would be asserted against it as the substitute party for Schoem, cannot be brought

by this plaintiff and that their exclusive remedy for matters arising out of her employment relationship for discriminatory acts are under Title 7. The court agrees, and I therefore will first substitute the United States for Mr. Schoem as a defendant, and I will dismiss all claims against the United States which, of course, includes all of these tort claims contained in various counts of complaint.

The balance of the complaint, which is against Ms. Nord in her capacity as Acting Chair of the CPSC, is, as I have said, broken into six counts, all of which, at least in part, are based on violations of Title 7.

The factual circumstances that form the basis of this complaint are that the plaintiff joined the CPSC in March of 1997 as a compliance officer, and she raises various complaints in relation to her employment as a compliance officer which broadly are broken into three or four categories. One is that she complains that she was not given some training that was given to another employee which she contends is discriminatory.

She also complains that she was issued a false reprimand and urges that that was discriminatory. She also alleges that she was not given a promotion in January 2006 and that that was discriminatory as well as retaliatory.

She also alleges that she endured a hostile work environment and that she was also the subject of a false investigation. She includes allegations in her complaint that certain settlements that she reached—that I will describe in a moment—were fraudulent or were without consideration. The specific circumstances described in her complaint—and I'll take them in approximately chronological order

but not perfect—are first in Count Two she alleges that she was not given training that—and that she believes that was discriminatory, and the dates of denial of training are June and October, respectively, of 2003. She submitted a complaint to the EEOC arising out of denials of training, and that was settled in August of 2004.

First, any claims for substantive discrimination under Title 7 relating to the alleged denial of training in June and October of 2003 would be barred by the settlement agreement that she has signed in the absence of that settlement agreement being set aside, and I will address the question of whether it should be set aside separately. But, assuming for a moment the viability of the settlement agreement, any claims at this time for substantive violation of Title 7 arising out of denial of training in June and October 2003 are simply barred by her settlement with the agency.

She also claims that denial of training was retaliatory for EEO activity. The problem with that is that the EEO activity came after the date of the alleged denials of training, so it's certainly a case of the cart in front of the horse. There cannot be retaliation in the form of denial of training for EEO activity that did not take place until many months later. I conclude, therefore, with respect to Count Two of the complaint that the motion now only including Ms. Nord should be granted.

The next question is that in September of 2004 she alleges that she was issued a memorandum of retaliation—of reprimand and alleges that the reprimand was a false reprimand and that it was issued retaliation for the first complaint for denial of training.

In this case the reprimand occurred in September 2004; there was a complaint to the EEOC, and there was a settlement reached on October 18, 2004. I conclude as to Count One, which is a count alleging that the false reprimand or alleged false reprimand was retaliatory, whatever the merit may be, it is barred by the release signed by the plaintiff with the agency in the absence of any basis to set it aside which I will address separately. Accordingly, I will grant the motion of Ms. Nord for dismissal or in the alternative for summary judgment on Count One.

Count Three is a count that addresses the failure to provide for her a promotion to a position for which she applied and which was filled in January 2006. That failure to promote was the subject of the plaintiff's third complaint of discrimination to the EEOC which has been exhausted and is now before this court. It is not one that was settled. In this case she's alleging that the denial of promotion was both retaliatory and discriminatory.

The first point is that the last protected activity that she engaged in, the last possible date would be the execution of her settlement agreement in October of 2004, if I extend it all way to the end of the EEO process as opposed to the beginning. The non-promotion is alleged to have taken place in January of 2006, many months later. So, first of all, a significantly long period of time between the date of the protected activity and the denial of the promotion.

The courts have ruled that a causal relationship, which is required in order to sustain a retaliation claim, may be inferred from temporal proximity between an employer's knowledge of the protected activity and the alleged adverse employment action.

However, in order to be sufficient evidence of causality, that temporal proximity must be very close.

Counsel for the defense has alluded to several cases that have had periods of time similar to this one that have been held not to be close enough. The 16-month, or the very lengthy gap here between the date of the last protected EEO activity and the failure to promote, I suggest, negates any inference of causation, but then we'll move to the question of the denial of the promotion as a discriminatory act in and of itself.

Even assuming that the plaintiff has made out a prima facia case of retaliation or of employment discrimination, the problem with this count is that the defendant assuming for purposes of discussion that the claims asserted in this count establish a prima facia case has failed to rebut the legitimate, nondiscriminatory reasons that have been provided in great detail by the defendant.

The courts have ruled that once the defendant has articulated a legitimate, nondiscriminatory reason for an adverse employment action, the plaintiff must then prove by a preponderance of the evidence that the employer's proffered reason was not the true reason. In order to prove pretext, the plaintiff must show that the employer's proffered reasons are unworthy of credence or by offering evidence sufficiently probative of retaliation.

I have carefully reviewed the response of the plaintiff and, as I must give all the inferences in favor of the nonmoving party, but even with the benefit of those inferences I find that she has failed to come forward with a preponderance of the evidence to demonstrate that the proffered reason was not the true reason and that the reasons given were pre-

textural. Accordingly, I conclude that Count Three will be dismissed or, in the alternative, summary judgment granted to the defendant.

Count Four of the complaint is entitled "Retaliation and Reprisal, Fraud, and Malicious Abuse of Process." Unfortunately, this complaint does not fully comply with the command of Rule 10(B) of the Federal Rules of Civil Procedure, which states that each claim must be stated in a separate count. I have already addressed this complaint insofar as it asserts any tort claims for fraud or malicious abuse of process and have concluded that those claims are precluded as a matter of law, both because the United States has not consented to that; and, secondly, under Title 7, the exclusive recovery framework for such claims is under Title 7. I will really look at this count as asserting claims that the settlement agreements reached by the plaintiff in August and October of 2004 should be set aside on the basis of, as argued today I think for the first time, a lack of consideration or for fraud.

I have examined the papers submitted by the parties and the affidavits and first, simply as a matter of pleading, the heightened requirements for pleading a fraud are simply not met in this case at all. The plaintiff may very sincerely believe that she got a raw deal, that she couldn't have got—could have gotten a better deal in her settlements; she may feel that the agency has been less than enthusiastic in its compliance with those agreements, and those may be legitimately-held views of hers, but they simply do not rise up to giving sufficient factual allegations with particularity required by the Federal Rules of civil Procedure or in the context of summary judgment, given anything from which an inference could

be made in her favor that these agreements were procured by fraud, and I conclude that any suggestion that these agreements should be set aside for fraud is simply not supported by any information in this regard that would justify a jury inferring fraud in the procurement of these settlements.

The plaintiff has also argued today absence of consideration. I find that claim to be devoid of merit as well. First of all, there's nothing before me on that other than the express terms of the agreements themselves, and the agreements are not on their face without consideration. It appears that the consideration to which the CPSC committed itself was in fact furnished. For example, in the August 2004 agreement, the CPSC agreed to detail her to the Office of the Secretary and that in fact happened. CPSC was under no obligation to do that, and that's a classic definition of "consideration."

There are numerous other matters contained in here, none of which it can seriously be contended was not done by the CPSC. Maybe the consideration could have been greater and maybe a better deal could have been procured by this plaintiff had she had counsel for these agreements, but I cannot take 20/20 vision of hindsight or "would've, could've, should've" and eviscerate these agreements and conclude that they don't exist. The agreements do exist; they are supported by consideration that was furnished. I find utterly devoid of merit any suggestion that they were procured by fraud, and therefore I conclude that Count Four, to the extent that it seeks to eviscerate these agreements or the effects of these agreements, is wanting and that Count Four of the complaint must have dismissal or summary judgment granted.

As some of the cases have said, there is no cause of action for mishandling and EEO complaint or doing a bad job of handling it, and I concur, but I certainly see no basis to set these aside on the basis of fraud or lack of consideration.

Count Five is a count that is entitled "Retaliation and Reprisal, Malicious Abuse of Process, Business Defamation, Intentional Affliction of Emotional Distress." As I have said already with regard to Count Four, all of these claims that appear in the title of this count that are tort-type of claims I have already decided are not viable and must be dismissed.

I would also point out that the factual content of Count Five simply doesn't state a cause of action for any of these tort claims. For example, intentional infliction of emotional distress, under Maryland law, requires far more than is alleged in Count Five. It basically requires that the person's emotions be such that they can hardly bear to live, and that is a far cry from what's pleaded here. In any event, the question is not sufficiency of the allegations as a matter of tort law but .whether they can be asserted at all against either Ms. Nord under Title 7, which makes that her — the plaintiff's exclusive remedy, or against the United States as the substituted party, which has not consented to this and which these claims simply are not viable. I, therefore, conclude that the motion must be granted as well as to Count Five.

Count Five also appears to be a count that asserts hostile work environment. The plaintiff really has not addressed that too much in her opposition, but it's clear that under the standards in this jurisdiction, the matters that she complains of in this count were not sufficiently severe or pervasive to amount to a hostile work environment. In any event, large por-

tions of them, if not all of them, are the subject of the releases that bar her claims under counts One and Two.

The last count is Count Six. Count Six is entitled "Retaliation, Reprisal, Malicious Abuse of Process." I've already indicated that the malicious abuse of process, to the extent that that is attempting to assert a tort claim, is not viable, and that portion of this count must be dismissed. With regard to the balance of this count, it essentially is indicating that she was made the subject of a false investigation and that that was in retaliation for her protected EEO activity.

Putting aside the question of whether exhaustion for retaliation is required about which reasonable legal minds might differ, the problem with this claim is the absence of any temporal relationship between so-called false investigation that ended up with nothing happening on the one hand and her permitted—her protected EEO activity. The temporal relationship is so distant that I conclude that there could not be a prima facia case established and, accordingly, I conclude that this count as well must be dismissed.

I'll specifically point out on this question of the temporal proximity that her earlier investigation relating to non-promotion, the last part of that was in 2007, and that her complaint about this investigation relates to something that took place in July 2007 and that was more than a year after the filing of her third complaint in April of 2006 which, again, is far too long a period of time to infer any nexus between the protected activity on the one hand and the alleged discriminatory act on the other.

For those reasons, I will enter an order today granting the defendant's motion to dismiss or in the alternative for summary judgment. Thank you.

(Off the record at 11:47 a.m.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case Number: RWT 07cv2641

VALERY V. CEASAR,
Plaintiff

v.

Nancy A. NORD, Acting Chairman, United States Consumer Product Safety Commission, *et al.*,
Defendants

ORDER

Upon consideration of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment [Paper No. 8], including the Westfall Certification stating that Defendant Marc Schoem was acting with the scope of his employment as an employee of the United States at the time of the incidents in question, the response and reply thereto, and the arguments of counsel presented at the hearing conducted before the undersigned today, for the reasons stated on the record, it is this 16th day of July, 2008, by the United States District Court for the District of Maryland,

ORDERED, that the United States of America is SUBSTITUTED as a defendant in this matter in place of Marc Schoem; and it is further

ORDERED, that Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment [Paper No. 8] is GRANTED; and it is further

ORDERED, that judgment for costs be entered in favor of Defendants Nord and the United States of America; and it is further

ORDERED, that the Clerk of the Court CLOSE THE CASE.

/s/
ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

No. 08-1900

VALERY V. CEASAR,
Plaintiff-Appellant,

v.

NANCY A. NORD, Acting Chairman,
U.S. Consumer Product Safety Commission;
United States of America,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at *99 Greenbelt.
Roger W. Titus, District Judge. (8:07-cv-02641-RWT).

Submitted: Aug. 20, 2009.

Decided: Aug. 24, 2009.

John F. Mercer, Mercer Law Associates, PLLC, Washington, D.C., for Appellant. Michael Hertz, Acting Assistant Attorney General, Rod J. Rosenstein, United States Attorney, Marleigh D. Dover, Melissa N. Patterson, Department of Justice, Washington, D.C., for Appellees.

Before WILKINSON and MICHAEL, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

Affirmed by unpublished PER CURIAM opinion. Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Valery V. Ceasar appeals the district court's order granting summary judgment to Defendants on her claims of retaliation and employment discrimination. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Ceasar v. Nord*, No. 8:07-cv-02641-RWT (D.Md. July 18, 2008). We grant Appellees' motion to file a supplemental appendix. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

APPENDIX D

42 U.S.C.A. § 2000e-3

Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. (b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission

to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. ___

VALERY V. CEASAR, 1610 Belvedere Boulevard, Silver Spring, Maryland 20902

Plaintiff,

v.

NANCY A. NORD, ACTING CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION, 4330 East West Highway Bethesda, Maryland 20814

MARC SCHOEM, DEPUTY DIRECTOR, OFFICE OF COMPLIANCE AND FIELD OPERATIONS U.S. CONSUMER PRODUCT SAFETY COMMISSION, 4330 East West Highway Bethesda, Maryland 20814 (In his Individual and Official Capacities)

Defendants.

COMPLAINT FOR EMPLOYMENT DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT

Comes now the Plaintiff, Valery V. Ceasar, by and through counsel, John F. Mercer, Esquire, and states the following as her complaint in the above matters,

1. This action arises under 42 U.S.C. §§ 2000e 5(f)(1)-2000e 5(f)(3), 28 U.S.C. § 1331, et. seq., 29 U.S.C. 206(d), 28 U.S.C. § 1391, and 28 U.S.C. § 1441. This Complaint is timely filed within ninety (90) days of receipt of "Final Decision and Notice of Rights" issued

July 2, 2007, pursuant to 29 C.F.R. § 1601.28(a) by Kathleen V. Buttrey, Director, Office of Equal Employment Opportunity and Minority Enterprise, U.S. CPSC, 4330 East West Highway, Suite 521, Bethesda, Maryland 20814 (See Exhibit #1).

This Court has jurisdiction over all claims for relief, including state claims under the supplemental and ancillary jurisdiction of the federal court. Venue is proper in this Court as shall be set forth herein below.

THE PARTIES

2. Plaintiff, Valery V. Ceasar, is a resident of the State of Maryland. She lives at 1610 Belvedere Boulevard, Silver Spring, Maryland 20902. At all times pertinent to this Complaint, Plaintiff was a resident of the State of Maryland and was employed by the Defendant Agency.

3. Defendant, U.S. Consumer Product Safety Commission ("Defendant" or "Agency" or "CPSC") is an agency of the government of the United States and acted at all times hereunder by and through its Acting Chairman, Nancy A. Nord and various other employees and agents of the Agency, including Marc J. Schoem. The Agency is an "employer" pursuant to 42 U.S.C. § 2000e and was so situated during all times pertinent herein. Its principal office is located at 4330 East West Highway, Bethesda, Maryland 20814.

4. That Defendant Marc J. Schoem ("Schoem") is an employee of the Agency. He serves as Deputy Director of the Agency's Office of Compliance and Field Operations Division. His office is located at 4330 East West Highway, Bethesda, Maryland 20814. At all times during the events set out in this

complaint, Schoem was employed with the Agency and acted as an agent of the Agency.

CASE SUMMARY

5. This Plaintiff has been the victim of retaliation and reprisal stemming from her complaints of discrimination extending several years and continuing to the present. It has resulted in the denial of training and promotion, and featured intimidation, hostility and threats of adverse actions. In addition, the Agency has used its administrative process of Alternate Dispute Resolution ("ADR") as means of deceit, fraudulently suppressing Plaintiff's complaints and perpetuating an environment where discriminatory tactics could be camouflaged. Thus, the terms of two discrimination settlement agreements were willfully ignored and violated, leaving the Plaintiff at the mercy of superiors who had no intention of treating her fairly. Throughout, the Agency's administrators acted without integrity or fairness repeatedly allowing the Plaintiff to be unprotected against continuous acts of discriminatory misconduct based upon her race and sex.

6. In March of 1997, the Plaintiff, an African American female with a college degree and sterling record of government service spanning seventeen ("17") years of varied administrative and professional positions, embarked upon a career in service of the U.S. Consumer Product Safety Commission (CPSC), a federal agency with a bold and exciting mission, that of protecting the Nation's consumers from potential hazards related to thousands of products available for purchase in an expanding and vibrant U.S. consumer market.

7. The Plaintiff arrived at the CPSC well experienced and equipped for her tasks. She had assiduously worked her way up in government service from the position of clerk typist GS-2 at the Department of Labor to the rank of GS-1 1 at the U.S. Commodity Futures Trading Commission, earning her college degree in business along the way. Unfortunately, the Plaintiff's career at CPSC, impeded by employment discrimination, has not risen to a level commensurate with her efforts and competence. Entering CSPC as a grade GS-12, the Plaintiff immediately immersed herself in her work as a "Compliance Officer" in the Agency's "Office of Compliance, Recalls and Compliance Division" (the "Compliance Division"). In so doing, she employed her understanding of teamwork to advance the mission of her division. In pursuing the goals of the Compliance Division, the Plaintiff relied upon her previous work experience and her belief in seamless interaction between all levels of employees.

8. As the Plaintiff rose to levels above GS-12, she entered rare territory for an African American female at CPSC. On the usual day at work (and often for an entire week), the Plaintiff was unlikely to encounter another African American female at her position and pay grade.

9. In Spring of 1998, Richard Stern ("Stern"), a white male, was hired and brought into the Compliance Division as a GS-13. In 2000, though he was junior to the Plaintiff, Stern and the Plaintiff were simultaneously promoted to the level of GS-14. In their respective positions, both Stern and the Plaintiff had the same duties and responsibilities. Shortly after his promotion, Stern was approved by their supervisors for "executive training" as preparation

for moving up the career ladder. Despite Plaintiff's broader work experience, senior tenure in the Agency, and more favorable interaction with her peers and subordinates, Plaintiff's contemporaneous requests for "executive training" were denied. There was no reason for the refusal but her race and sex.

10. In 2004, the Plaintiff brought an action of discrimination against the Agency based upon its denial of her requests for executive training. She alleged disparate treatment. A settlement was reached. Still, the Agency failed to take remedial action. While the Agency hid behind a benign settlement agreement and continued to deny the Plaintiff executive training, the Plaintiff had no knowledge of the Agency's inaction. Further, her supervisor, defendant Marc Schoem and others engaged in retaliatory conduct. Ultimately, the Plaintiff instituted two further actions of discrimination against the Agency alleging retaliation and reprisal. The second complaint alleged that almost immediately after settlement of the first complaint, the Plaintiff's superiors retaliated against her by creating and filing against her a false "reprimand." The third complaint alleged that the Agency had retaliated the Plaintiff by using a scheme to pre-select Stern to a supervisory position for which the Plaintiff had applied, merited and would have been selected for, but for the retaliatory and discriminatory selection of Stern.

STATEMENT OF FACTS

11. That Plaintiff is an African American female. She is currently an employee of the Agency. Her title is Compliance Officer, GS-1801-14. Her salary is $109, 000.00 per year;

12. That Plaintiff, a native of New York City, came to Washington, D.C. in August 1978 to attend Howard University. After working in the U.S. Government and attending college at the same time, she graduated from Howard University in 1986 with a Bachelor's degree in Business Administration, with emphasis in Business Management.

13. That during and subsequent her matriculation of undergraduate school, Plaintiff was employed with the U.S Government. Her initial position was with the U.S. Department of Labor where she was employed as a clerk, GS-2 with the Department of Labor in 1979, and thereafter at various federal agencies in a variety of positions. By the time of the occurrences presented herein, she has risen to the level of GS-14.

14. That in March 1997, Plaintiff was offered, and accepted a position, as a Compliance Officer, GS-12 with U.S. Consumer Product Safety Commission (the "Agency" or "CPSC"). Plaintiff has been employed by the Agency as a Compliance Officer, since that time and has been promoted to the GS-14 level. Her current position is that of GS-14 Compliance Officer. In her position, she is responsible for investigating complaints of product defects and negotiating corrective action plans with manufacturers, retailers, importers, and distributors. She works with a team of compliance officers and technical experts, and is currently the senior grade on her team.

15. That on May 30, 2002, Richard Stern ("Stern"), who began working for the Agency in the position of Compliance Officer in March 1998 and was trained as a new Compliance Officer by the Plaintiff, requested by memorandum that Alan Schoem and Marc Schoem provide him with "Washington Executive Seminar for SES Candidates Leadership Training" at

the expense of the Agency. His request for executive leadership training was approved. Prior to sending the memorandum of request, Stern had discussed this training opportunity with the Schoems.

16. That on or about July 23, 2002, after having discovered that this training was approved for Stern, Plaintiff requested the same executive leadership training from Alan Schoem, Marc Schoem, and her supervisor Roy Deppa. Specifically, on July 22, 2003 and October 6, 2003, the Plaintiff had also requested (1) a course on "writing guidelines" "newsletters" and "brochures" and (2) a "skills development course" on conducting "interviews." All her requests were refused. The reason given Plaintiff by Deppa was that such training would have been "an unnecessary training expense."

17. That on July 19, 2004, the Plaintiff filed a complaint of discrimination with the Agency's Office of Equal Employment Opportunity "the EEO Office". In her complaint, she alleged that she was the victim of "disparate treatment" perpetrated by Roy Deppa ("Deppa") (her immediate supervisor) and others unknown to her, based upon race. The Plaintiff further alleged in the complaint that she was being denied career advancement because of discrimination based upon race. At the time of the occurrence of the discrimination, Deppa's immediate supervisor was Marc Schoem.

18. The Agency's EEO Office investigated her complaint in 2004. The Agency assigned a counsel to the complaint, Margaret Plank ("Plank") of the Agency's Office of the General Counsel. The Plaintiff agreed to pursue resolution of her complaint through mediation. Though they were asked to participate in the mediation, both Alan Schoem and Marc Schoem

refused to physically participate in the mediation. However, as the Agency's EEO Office presided over the mediation, the Schoems were available by phone in another room.

19. That on August 4, 2004 the parties entered into a settlement agreement (the "Agreement One" attached hereto as "Exhibit #2") resolving the complaint. Pursuant to the Agreement One, Plaintiff was detailed to the Office of the Secretary of the Agency. The parties signed the agreement. The Plaintiff believed Agreement One had been accepted in good faith by the parties and would remedy the Defendants' discriminatory conduct. The detail, originally to last for four months, instead, continued for a period of fourteen months.

20. That almost immediately after Agreement One was signed, the Agency through Roy Deppa, Marc Schoem, and Alan Schoem, began to engage in a campaign of hostile, malicious, and retaliatory actions, which included efforts to: isolate the Plaintiff from other employees, defame the Plaintiff amongst her co-workers, have Plaintiff perceived as a pariah and trouble maker, deny the Plaintiff advancement opportunities, and create a hostile working environment for the Plaintiff. At the same time, others at the Agency, of different gender and race or ethnicity from Plaintiff, but similarly situated with Plaintiff, were supported in career advancement training opportunities and were afforded opportunities for participation on various office projects, panels, and workshops not afforded Plaintiff. When the Plaintiff finally confronted Marc Schoem about his unresponsiveness to her requests for career advancement opportunities, he told her: because she filed an EEO complaint, he did not "know what to do about approving" the

Plaintiff's training requests and that he just wanted her to "do her job."

In addition to the foregoing, the employer used facially neutrally employment policies and practices in a deceitful and treacherous manner to harm the Plaintiff and create a false and misleading employment record for Plaintiff such that her opportunities for advancement would be diminished.

21. That the Plaintiff was scheduled for and participated in a "mid-term progress review" conducted by Deppa on August 5, 2004. The review appeared to be routine and it was absent assertions of deficient performance or other negatives. After the review, the Plaintiff left for vacation.

22. That immediately upon the Plaintiff's return from vacation, on September 2, 2004, Plaintiff was summoned to Deppa's office where he presented Plaintiff with a written "Memorandum of Reprimand" accusing the Plaintiff of misconduct. These allegations, composed by Deppa with the collaboration and approval of Marc Schoem and other employees, were false and contrived. Deppa urged the Plaintiff to sign the Memorandum of Reprimand. Because the accusations contained therein were false, the Plaintiff refused to sign.

23. That on September 2, 2004, the Plaintiff requested a meeting with Kathleen V. Buttrey, Director of the Agency's Office of Equal Employment Opportunity and Minority Enterprise. On September 8, 2004, Plaintiff filed a complaint of discrimination ("Complaint Two") charging Roy Deppa and the Agency (including Marc Schoem and Alan Schoem) with having composed and issued the "Memorandum of Reprimand" as a retaliatory act of discrimination

because of her filing of Complaint One. On September 8, 2004, Plaintiff completed the EEO intake process. The Plaintiff requested ADR and formal mediation. The Complaint was settled by mediation, and the parties executed a Settlement Agreement.

24. That in a Settlement Agreement ("Agreement Two" attached hereto as "Exhibit Three") dated October 18, 2004, in paragraph "f" thereof, the Agency agreed to the following: "The Memorandum of Reprimand dated August 31, 2004, will be removed from Ms. Ceasar's Official Personnel File effective immediately upon signing this agreement. All copies of the memorandum, including but not necessarily limited to copies that may be in Ms. Ceasar's Employee Relations File or in the files of current supervisors in Compliance, will be removed and delivered to the EEO Office for destruction. The EEO file will contain the only agency record of the rescinded reprimand (sic)."

25. That on October 12, 2005, the Plaintiff met with John G. Mullan, Assistant Executive Director of the Office of Compliance and Field Operations, and Marc J. Schoem to discuss the end of the "Plaintiff's detail and return to the Office of Compliance." Thereafter, the Plaintiff's detail was ended; on or about October 15, 2005, Plaintiff returned to the Office of Compliance and Field Operations. That on December 5, 2005, the Agency announced that two vacancies for identical positions of Supervisory Compliance Officer (the "Position") for different work teams would be advertised for submission of application under vacancy announcement number CPSC-014-06.

26. That on December 15, 2005, the Plaintiff submitted her application for the Position. There-

after, the Plaintiff spoke with Glenda Martin of the Agency's Office of Human Resource Management. Ms. Martin informed the Plaintiff that she had been certified as eligible for the position.

27. That on January 10, 2006, the Plaintiff's interview was scheduled for January 11, 2006 at 3:00 PM with three supervisors, all from the Office of Compliance and Field Operations. The Plaintiff participated in the interview process. A second round of interviews followed with John G. Mullan, Assistant Executive Director, and Marc Schoem, Deputy Director, of the Office of Compliance and Field Operations on January 17, 2006.

28. That Marc Schoem informed the Plaintiff of her non-selection for the position on January 23, 2006. She was told that Stern had been selected for the Position of Fueled Electrical and Recreational Products team and that Frank Krivda was selected for the Children's Product Team.

29. That Schoem, as the selecting official acting with specific knowledge that the GS-15 Supervisory Compliance Officer position (the "Position") would be opened for candidates, by design and with premeditation, engaged in an effort to eliminate the Plaintiff from fair competition for the Position. That prior to formal selection, as part of that effort, Schoem ensured that interview criteria unfairly slanted towards Stern's work experiences and skills, and that the Plaintiff's skills would neither be duly considered nor highly valued in determining whether she was most qualified for the Position.

30. That Schoem, as the selecting official, exercised control over the participating interview panel and timing of the opening and closing date for appli-

cations. Consequently, while the Plaintiff was on detail and unaware that the Position would be open, Schoem installed Plaintiff's less tenured coworker, GS-14, Richard Stern ("Stern") as paid "acting" occupant of the Position, wherein he remained for ninety (90) days preceding the opening of the Position for candidates. During the time he was "acting" in the Position, Schoem promoted Stern by personnel action to the GS-15 position and compensated him at that level.

31. That Schoem had the authority to rotate the "acting" responsibilities among several applicants (all female) who were qualified for the Position. Thus, Schoem used the Plaintiff's detail (which he helped institute as condition of Agreement Two) as a ruse and retaliatory device to ensure that the Plaintiff was not available to serve as "acting" in the Position prior to its advertisement for candidates. (Previously, Compliance Management said that "senior members of the staff would be allowed to rotate in the position of acting director," however, such rotation never occurred so Plaintiff never had the opportunity). At the time he participated in negotiating Agreement Two, Schoem knew he was going to pre-select Stern for the Position and eliminate the Plaintiff from meaningfully competing for the Position even though she was the most qualified candidate.

32. That after serious reflection on the sequence of occurrences and the circumstances under which she had been denied the Position, on February 21, 2006, the Plaintiff filed a complaint with the Agency's EEO Office alleging discrimination ("Complaint Three"). She requested ADR. On March 28, 2006, the Plaintiff participated in mediation. The participants in the mediations were Margaret Plank, Marc Schoem, Earl

Phillips, the Plaintiff and two shared neutral mediators, Bernadette G. Fowler and Barbara J. Elkin. Mediation was unsuccessful.

33. That on April 6, 2006, Complaint Three was made formal. In that complaint, the Plaintiff alleged discrimination on the basis of retaliation reprisal.

34. That after Stern's selection for the Position, Schoem further intensified his retaliatory campaign against the Plaintiff. He quickly informed Plaintiff that she had no team and that any "mentoring" she had been conducting with staff prior to Stern's elevation was to stop immediately. The Plaintiff asked Schoem why Stern, rather than she, had been selected for the position. Schoem told her that it was the fact that "Richard had been acting for the FER team to the present and had the experience"; and that previously Stern had been "Acting Associate Director for Engineering"; and it was a combination of that experience and the present experience that "they believed made Richard Stern more qualified for the [Position]."

35. That Schoem predetermined the selection of Stern for the position. Interviews were manipulated and superficial. The scope of the interviews was limited to subject areas Schoem wanted considered because they would have been to the advantage of his pre-selected applicant, Richard Stern. Because of Schoem's manipulation, the interview panel failed to credit the Plaintiff's superior qualifications, including her rich work experience, disposition, and leadership qualities. Instead, they considered undefined, ambiguous, and non-Position related matters, for example, the Plaintiff's "political savvy."

36. That had a non-discriminatory and properly guided process of selection for the Position been conducted, not only would the Plaintiff's rich work experience been considered, but also Plaintiff's obvious superior characteristics: her demeanor, technical proficiency, ability to get along with and motivate her subordinates, and her superior experience as a team leader compared to that of Stern. In addition, the Plaintiff had superior experience and knowledge of staff responsibilities, based upon her career experience in actually working her way up in the government in various federal offices.

37. That subsequent the filing of Complaint Three, approximately three years after Complaint One had been filed (April 6, 2004) and while Complaint Three was pending action before the EEOC, upon the urging of the Agency, Schoem finally submitted Plaintiff's name to the Agency's Office of Human Resource Management and accepted the Plaintiff's request for executive leadership training in June 2007.

38. That on July 31, 2007, the Plaintiff was approved for executive leadership training classes.

39. That during the period of Plaintiff's Complaints One, Two, and Three, the Agency fostered and maintained a chronic policy of under-representation of African Americans in the GS-15 levels. This chronic problem results from the Agency's failure to seriously attack illegal discrimination. The specific actions of which she has complained for more than three years have been manifest in the actions of Marc Schoem and other Agency management in her non-selection for the Position and other mistreatment identified in her several complaints, affidavits, letters, and other documents.

40. That during the investigation of Complaint Three, the Defendants, acting surreptitiously, intentionally circumvented EEOC regulations by manipulating the EEO investigative process so as to narrow the investigation so that important incidents of retaliation were not pursued by the EEO investigator. For example, though failure to provide executive training opportunities was a major element of the reprisal campaign against the Plaintiff, the EEO refrained from interviewing alleged discriminating officials (Deppa and Schoem) regarding their refusal to respond to Plaintiff's multiple requests for executive training while approving such opportunities for her peers. Information concerning the refusal of the Plaintiff's executive training requests was essential to Complaint Three.

41. That when the Plaintiff received the "Report of Investigation" (the "ROI"), she realized her allegations of retaliation had not been fully investigated. She wrote a letter (dated October 5, 2006) to the head of agency, Nancy A. Nord, Acting Chairman (the "ROI Letter" attached hereto as "Exhibit # 4"), complaining that the investigative report had not adequately covered all areas of retaliation complained of by the Plaintiff. In the ROI Letter, the Plaintiff requested that the investigation be reopened so as to thoroughly interview pertinent witnesses and obtain evidence of retaliation and reprisal.

42. That Nord did not respond to the ROI Letter, nor did she refer it to the Director of the Agency's EEO Office for resolution of the Plaintiff's request therein. Instead, the ROI Letter was responded to by Agency's Associate General Counsel, Margaret Plank, who represented the Discriminating Parties in Complaints One and Two, Settlements One and Two, and

was representing the Discriminating Parties in Complaint Three. Nevertheless, Ms. Plank wrote a response to the ROI Letter on behalf of Nord denying the Plaintiff's request therein to broaden the investigation and to interview Deppa and Schoem concerning her claims of retaliation and reprisal. In so doing, Ms. Plank, Chairman Nord, and the Agency violated U.S. Code of Federal Regulations, 29 C.F.R. § 1614.102, as well as the American Bar Association's Model Rules of Professional Conduct, Model Code of Prof'l Conduct R. 1.13 (2007), prohibiting an attorney from representation that is a violation of a legal obligation to the organization that is her client. Further, attorneys for a government agency have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances; thus, a government lawyer is effectively held to a higher standard of assuring that a wrongful act is prevented or rectified, since protection of public business is inherently a function of her job. Model Code of Prof'l Conduct R. 1. 13, cmt. 9 (2007). The foregoing evasive and unethical actions taken by Plank, Nord, and the Agency subverted and unfairly narrowed the EEO investigation to the disadvantage of the Plaintiff in her pursuit of relief from discrimination and retaliation.

43. That after the appointment of Richard Stern to the Position, acts of retaliation and reprisal have continued and escalated. On June 14, 2007, during the Plaintiff's mid-year progress review, with clear knowledge of Plaintiff's pending EEO complaints and Complaints One and Two, Stern interfered with the Plaintiff's right to privacy and her right to privileged communications with counsel in her EEO matter. Stern inquired of the Plaintiff as to why she kept her

office door closed when talking to fellow employees. He also remarked to Plaintiff that "if [she needs] to speak with her legal counsel, [she] should go to a conference room because staff members can stand outside her office and overhear her conversations."

44. That on July 31, 2007, the Plaintiff was contacted by email by Robert Raffety ("Raffety"), another attorney in the Office of General Counsel, who knew or had reason to know of the campaign of retaliation against Plaintiff. In that email she was informed by Raffety that he had been asked by "management" to serve as an independent fact finder for this investigation and that she was the subject of an "informal investigation" concerning statements she might have made to an employee at the Whirlpool Corporation, with which Stern had negotiated and with which he was preparing to be employed. The Plaintiff was further told that the investigation could lead to an adverse action proceeding. Raffety explained to the Plaintiff that she would be required to attend a meeting with him concerning the allegation of misconduct (the "Informal Investigation Meeting"). The Plaintiff was told that she was entitled to "independent representation" at the Informal Investigation Meeting.

45. That prior to establishment of the date and time of the Informal Investigation Meeting, the Plaintiff inquired as to the nature of the meeting, the specific infractions being investigated, the source of the information leading to the Informal Investigation the applicable rules of the Informal investigation. She asked that the response to these questions be provided in writing prior to the meeting. Raffety refused to answer the questions prior to attending

the Informal Investigation Meeting, but said the questions "might be answered at the Meeting."

46. That the Informal Investigation Meeting was held on August 14, 2007. The Plaintiff was accompanied at the meeting by counsel. Raffety was accompanied by Beth Schwab, Personnel Appointee of the Agency, who attended as a "witness." Raffety refused to answer the questions earlier posed regarding the nature or basis of the investigation, the rules to be applied, who had authorized the investigation, and the parties whom initiated the investigation. The meeting was aborted on the advice of Plaintiff's counsel. Subsequently thereafter, Raffety emailed the Plaintiff informing her that he was closing the investigation and referring the matter to Donna Simpson, Director of Agency's Office of Human Resource Management.

47. That the Informal investigation was a ruse created by Stern, Schoem, and others to damage the Plaintiff's employment record by making it appear that she had engaged in some unspecified and undefined impropriety so that the Plaintiff would be impeded in advancing her career at the Agency. Accordingly, once Stern had accepted the position with Whirlpool and his position was opened to applicants, the institution of the Informal Investigation would prevent the Plaintiff from being appointed as acting in Stern's position.

48. That simultaneous to the activities involved in the Informal Investigation, Marc Schoem, by email, informed the staff that he had selected an Agency employee (white male, Scott Heh) whom was brought in from outside the Office of Compliance to "act" in Stern's former position, the same position to which Stern was appointed as "acting" during the period

which the Plaintiff was detailed to the Office of the Secretary; the same position to which Stern had been pre-selected by Schoem and ultimately appointed to permanently by Marc Schoem. The Informal Investigation was used by Schoem as a tactical device to distract attention from the upcoming vacancy of the same position he had earlier wrongfully denied the Plaintiff in 2006 by use of other discriminatory methods.

COUNT ONE: RETALIATION AND REPRISAL

49. That Count One incorporates by reference paragraphs One through Forty-Eight of the Complaint. The Plaintiff's act of filing a complaint for discrimination (July 19, 2004) alleging denial of career advancement because of discrimination on the basis of race and sex ("Complaint One") was an act protected by Title VII of the Civil Rights Act of 1964 as amended. That in retaliation and reprisal against the Plaintiff for filing a complaint, Marc Schoem, Roy Deppa, and others made false allegations against the Plaintiff in composing, issuing, publishing, and processing a false reprimand in an attempt to damage Plaintiff's employment record. That the Defendants and each of them discriminated against the Plaintiff on the basis of her race and sex in violation of Title VII of the Civil Rights Act of 1964 as amended. In doing so, the Defendants have caused damages to the Plaintiff in the amount of Four Hundred Thousand Dollars ($400,000.00)

COUNT TWO: RETALIATION AND REPRISAL

50. That Count Two of the Complaint incorporates by reference paragraphs One through Forty-Nine herein. By refusing to respond to the Plaintiff's requests for executive training and other advance-

ment opportunities as they had done for Plaintiff's White male peers, Defendants' actions were those of retaliation and reprisal. That in their actions of retaliation and reprisal embodied in refusing to respond to the Plaintiff's requests for executive training and advancement opportunities, the Defendants and each of them violated Title VII of the Civil Rights Act of 1964, as amended, and in doing so damaged the Plaintiff in the amount of Four Hundred Thousand Dollars ($400, 000.00).

COUNT THREE: RETALIATION AND REPRISAL

51. That Count Three of the Complaint incorporates by reference paragraphs One through Fifty herein. The Plaintiff's act of filing a complaint for discrimination on September 8, 2004, alleging that Roy Deppa and Marc Schoem, and other employees and agents of the Agency composed, issued, distributed and published a false, derogatory, and retaliatory reprimand for the purpose of permanently damaging Plaintiff's employment record ("Complaint One") was an act protected by Title VII of the Civil Rights Act of 1964 as amended. In retaliation and reprisal for Plaintiff's having filed Complaint Two, Defendants Marc Schoem, Roy Deppa, and other agents and employees of the Agency denied the Plaintiff a promotion to the Position of Supervising Compliance Officer by manipulating the selection process and pre-selecting Stern for the position. In so doing, the Defendants and each of them discriminated against the Plaintiff on the basis of her race and sex. That in retaliating against the Plaintiff in violation of Title VII of the Civil Rights Act of 1964 as amended, the Defendants have caused Plaintiff damages in the amount of Four Hundred Thousand Dollars ($400,000.00).

COUNT FOUR: RETALIATION AND REPRISAL, FRAUD, MALICIOUS ABUSE OF PROCESS

52. That Count Four of the Complaint incorporates by reference paragraphs One through Fifty-One herein. That the Plaintiff's acts of filing Complaints One and Two of against the Agency and its employees and agents for discrimination are acts protected by Title VII of the Civil Rights Act of 1964 as amended. That in retaliation for these protected acts, the Defendants and each of them maliciously abused process of law (regulations). In doing so, the Defendants corrupted procedures intended to provide Plaintiff relief from discrimination and instead, used the EEO settlement process in such a manner as to frustrate and disadvantage Plaintiff, and allowed her to be further victimized by discrimination.

53. That Settlement Agreements entered into by the Plaintiff in good faith (and ostensibly entered into by the Agency for resolving issues of discrimination), were fraudulently entered into by the Agency, and used by the Defendants to continue their retaliation and discriminatory actions. The Agency, during Settlements One and Two (unbeknownst to the Plaintiff) never intended to implement actions to assist Plaintiff in advancing in her career, receive fair treatment, nor monitor or mitigate the discriminatory actions of the Defendants. In fact, the Agency, by its actions in falsely entering into Settlement Agreements with no intention of carrying out the terms and conditions thereto, blatantly perpetuated a scheme of continuing discrimination against the Plaintiff.

54. That Defendants were able to use Settlements One and Two as cover for more outrageous and outlandish discriminatory tactics such as the issuing of a false reprimand, continuing to deny Plaintiff

training and advancement opportunities, denying the Plaintiff a position of employment and using surreptitious methods and illegal practices to appoint a less experienced and less qualified Agency employee, Richard Stern, to a position to which the Plaintiff should have been selected and appointed.

55. That by misusing the Settlement Agreements fraudulently as a ruse and device to repress, impede, and delay resolution of Plaintiff's complaints, the Agency has engaged in discrimination against the Plaintiff in the form of retaliation and reprisal in violation of the Title VII of the Civil Rights Act of 1964, as amended. By doing so, the Agency and the Defendants and each of them have combined to damage the Plaintiff in the amount of Eight Hundred Dollars ($800,000.00).

COUNT FIVE: RETALIATION AND REPRISAL, MALICIOUS ABUSE OF PROCESS, BUSINESS DEFAMATION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

56. That Count Five of the Complaint incorporates by reference paragraphs One through Fifty-Five herein. The Plaintiff's acts of filing Complaints One, Two, and Three against the Agency, its employees, and agents for discrimination by the Plaintiff are acts protected by Title VII of the Civil Rights Act of 1964 as amended.

57. That in retaliation and reprisal for the Plaintiff's acts in filing Complaints One, Two, and Three, Defendants Marc Schoem, Richard Stern, and others combined to create a hostile work environment for the Plaintiff by harassing Plaintiff, isolating Plaintiff, making false accusations against the Plaintiff and advising Agency's employees to avoid

and stay away from the Plaintiff and to refrain from communicating with the Plaintiff, verbally or in writing, at each opportunity. To do so, Defendants issued documents causing the Plaintiff to be investigated and causing the Plaintiff to have false accusatory materials placed in her personnel file for spurious and contrived reasons. The foregoing actions on the part of the Defendants and each of them were intended to degrade, defame, intimidate, and destroy Plaintiff's morale. The foregoing actions violated Title VII of the Civil Rights act as amended and other regulations and statutes and also amount to malicious abuse of process (regulations and statutes) and business defamation. In committing such acts, the Defendants and each of them have damaged the Plaintiff in the amount of One Million nine Hundred Thousand Dollars ($1, 900,000.00).

COUNT SIX: RETALIATION, REPRISAL, MALICIOUS ABUSE OF PROCESS

58. That Count Six of the Complaint incorporates by reference paragraphs One through Fifty-Sven. The Plaintiff's acts of filing Complaints One, Two, and Three against the Agency, its employees and agents for discrimination by the Plaintiff are acts protected by Title VII of the Civil Rights Act of 1964 as amended. That the Defendants Marc Schoem, Richard Stern and others combined to falsely initiate an "Informal Investigation" of the Plaintiff by fraudulent and surreptitious means. In doing so, they violated rules and regulations of the United States Government and the Plaintiff's rights to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

59. That the sole intention of the Agency in initiating the false Informal Investigation was to

maliciously harm the Plaintiff, to retaliate against the Plaintiff, and to cause devastation to the Plaintiff's career advancement opportunities. In taking the foregoing actions against the Plaintiff, the Defendants and each of them violated Title VII of the Civil Rights Act of 1964, as amended, and engaged in malicious abuse of process causing damages to the Plaintiff in the amount of Nine Hundred Thousand Dollars ($900,000.00);

Wherefore the premises considered, the Plaintiff prays that this Court grant judgment to the Plaintiff:

(a). in the amount of Four Million Eight Hundred Thousand Dollars for compensatory damages;

(b). promotion to the GS-15 Supervisory Compliance Officer position with back pay;

(c). approved training and development course and assignments to be competitive for Senior Executive Service positions;

(d). attorney fees and costs of litigation and an order enjoining the Agency and the Defendants from further Acts of discrimination and reprisal.

Respectfully submitted,

_____

John F. Mercer, Esq.
Bar # 25539
Of Counsel
Tec Law Group. PLLC
1629 K Street, N.W., Suite 300
Washington, D.C. 20036
Telephone: 202.466.3830
Mobile: 240.535.8758
Telecopier: 301.249.4604
Attorney for the Plaintiff

JURY TRIAL DEMAND

The Plaintiff demands a jury trial in this matter pursuant to Rules 38(b) and 5(b) Fed. R. Civ. P.

_____

John F. Mercer

Date: October 1, 2007

APPENDIX F

1610 Belvedere Boulevard
Silver Spring, Maryland 20902
October 5, 2006

The Honorable Nancy A. Nord
Acting Chairman
Office of the Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway, Suite 722
Bethesda, Maryland 20814

Subject: Report of EEO investigation (R-O-I)
Valery V. Ceasar
CPSC-EEO-06-004

Dear Chairman Nord:

I am writing this letter to you to respectfully request that the investigation of my EEO complaint (Valery V. Ceasar CPSC-EEO-06-004) be extended to include pertinent information and facts not included in the above-mentioned investigation. The bases of my complaint are retaliation by Marc Schoem (for previously filing EEO complaints against his brother Alan Schoem, and the former Associate Director Roy Deppa) and the denial of career advancement because of race.

As part of a second settlement agreement involving the issue of reprisals against. me, I was detailed to a position outside of the Office of Compliance, not under the influence and control of anyone who had an interest in my complaint. Since returning from that detail in October 2005, Marc Schoem, who has now been appointed the Deputy Director for the Office of Compliance and Field Operations, has sought to destroy my reputation and organizational status.

Marc Schoem refuses to provide me with a current position description and, despite my status/experience; he has appointed lower graded members of the staff to serve as acting team leader. Additionally, Marc Schoem has consistently accused me of not, doing my job, but when I ask him what is it that he expects me to do, he refuses to provide a response to me. He devalues my experience and contributions to the team and office, and has cautioned members of staff about interacting with me in an effort to alienate me from the staff. Despite numerous requests, Marc has consistently denied me opportunities to attend training and development seminars, as well as opportunities that will promote my career advancement. My current supervisor has encouraged. me to keep making the requests and I have done so. I have even requested that Marc, through my supervisor identify training courses that management believes I could directly benefit from. Marc simply does not respond to my requests. When I confronted Marc about not responding to my training requests, his response to me was since I filed an EEO complaint, he didn't know what to do about approving my training.

Marc Schoem cleverly redesigned and reconstructed the GS-15 Supervisory Compliance Officer Position so that my experience and skills would not be considered or valued. The merit promotion process became null and void since Marc insured that the rating panel members, not knowingly, helped his plan of reprisal and retaliation by applying non-legitimate job criteria and evaluation factors.

Marc Schoem has previously had successful EEO complaints from other Compliance Officers filed against him, and he continues to demonstrate resentment, bitterness and open hostility to me because of my

EEO complaint. The Report of Investigation (R-O-I) erroneously focused, almost entirely, on the merit promotion process, and failed to pursue any line of questioning to address any of the reprisals actions that I raised.

Although I believe CSPC's under-representation problem for African Americans at. the GS-15 and above level is the result of illegal discrimination, it could also be the reason for my non-selection. The R-0-1 misses the mark and is grossly inadequate. The R-O-I lacks any information or facts regarding Marc Schoem's behavior, attitude and actions based on my participation in a protected activity.

The following is a partial list of pertinent questions and issues that should have been included in the R-O-I:

1. Was the Supervisory Compliance Officer Position altered to create an advantage for a white male applicant and to devalue my education, experience and qualifications?
2. Did the experience gained from a detail assignment to the position by the selected white male advantage him or influence the panel rating?
3. Why was I not allowed the opportunity to serve as acting or be detailed to the vacant position to gain the same experience?
4. Why has Marc Schoem refused to work with my current supervisor to update my position description?
5. Why has Marc Schoem refused to respond through my current supervisor to my requests for training and career advancement opportunities?

6. Why has Marc Schoem refused to discuss with me and/or my current supervisor anything regarding training and development program and activities?

7. Why does Marc continually diminish my knowledge experience and value to the team by isolating me from the team and other members of the staff, and allowing lower graded team members to serve as acting while I am present in the office?

8. What are the critical elements of the Supervisory Compliance Officer Position?

9. When informed by Marc Schoem that T. was not selected for the position, I was told by Marc that it was because of Richard Stern's experience—that he was an engineer and that he was presently serving as acting and that he had supervised before. However in reviewing the quality ranking factors for the position, none of the factors has a supervisory requirement, or required and engineering science degree or background. Why then was the selection criteria changed?

I am not certain how or why these issues of reprisals were omitted from the investigation. Since filing my very first complaint, I vehemently expressed concerns in discussions with Ms. Kathleen Buttrey, the EEO Director, Ms. Deborah Waterman, the EEO Program Manager, and Ms. Margaret Plank, Attorney in the General Counsel's office, that Marc Schoem would surely engage in reprisal actions against me if I were to return to the Office of Compliance. At that time, my discussions with the agency officials listed above were also witnessed by

my EEO representative, Mr. Earl W. Phillips. Further, all of the complaint documentation that I filed with the Office of Equal Employment and Minority Enterprise very clearly stated my deep concerns of reprisals. Having said all of the above, I wish to make it very clear that this complaint is not just simply a complaint about the hiring process.

To reiterate, my issues are retaliation/reprisal and a failure to advance because I am African American. I respectfully request that this letter be included in the complaint files for case and forward to the U.S. Equal Employment Opportunity Commission (EEOC). If you have any questions or wish to discuss this matter further, I am available. Thank you for your consideration.

Sincerely,

Valery V. Ceasar
Senior Compliance Officer

Attachment

Cc: Patricia A. Semple
Executive Director
Consumer Product Safety Commission
U.S. Consumer Product Safety Commission
4330 East West Highway, Suite 720
Bethesda, Maryland 20814

Kathleen V. Buttrey
Office of Equal Employment Opportunity
Consumer Product Safety Commission
U.S. Consumer Product Safety Commission
4330 East West Highway, Suite 712A
Bethesda, Maryland 20814

Mr. Gerry Rock
Contract EEO Specialist
206 Washburn Avenue North
Minneapolis, MN 55405

Mr. Earl W. Phillips
EEO Representative
7201 Piney Woods Place
Laurel, Maryland 20707

APPENDIX G

II. TIME SEQUENCE OF DISCRIMINATORY ACTS OF RETALIATION AS PRESERVED IN THE PLAINTIFF'S OPPOSITION BRIEF TO DEFENDANT'S MOTION TO DISMISS

Adverse Acts Caused by Retaliation,

Date	Event	Responsible Officials
		Alan Schoem, Marc Schoem, Roy Deppa, Richard Stern
	Calendar Year 2003	
07/22/03	Plaintiff requests of Roy Deppa for 2-day training course on designing newsletters to improve me writing skills. Request Denied.	
10/06/03	Plaintiff makes a request to Roy Deppa for one-day course in "Interviewing People" to improve my ability to interview consumers. Request Denied.	
	Calendar Year 2004	
02/13/04	Roy Deppa Issues Plaintiff a warning memo concerning her documenting observations on a case;	
02/17/04	Plaintiff responds to Roy Deppa's memo in writing via memo	
06/16/04	Roy Deppa approved 2-day fire training course for two male Compliance Officer staff members. Plaintiff requested the same course at a later date due to my being on vacation at the time the course was offered. No response received. The Plaintiff asked Roy Deppa to identify	

	courses that I can take. No response received.
07/12/04	Meeting w/ Roy Deppa in which he tells Plaintiff She is not performing at the GS-14 level. Roy also chastised Plaintiff for participating in an EEO Mediation of coworker which is a protected activity (Adverse Act Retaliation for participation in protected activity).
7/19/04	First Contact by Plaintiff w/EEO office (Protected Activity)
8/04/04	Signed First Settlement Agreement[1]
8/04/04	Plaintiff accept first "detail Assignment" pursuant to settlement;
8/17/04	Plaintiff commences "detail" to Office of Secretary (Protected Activity)
09/02/04	Roy Deppa issues The Plaintiff a non-merit "Letter of Reprimand" to punish her for filing an EEC) complaint. (Adverse Act-Harassment and intimidation corruption of Plaintiff's personnel file with a false disciplinary action)
09/02/04	Plaintiff contacted EEO Director to initiate a complaint of reprisal and retaliation actions of Roy Deppa approved by Alan and Marc Scboem.
09/06/04	Alan Schoem, Retires
10/18/04	Signed 2nd Settlement Agreement; resulting in the withdrawal of letter of reprimand and other documents

[1] See settlement Agreement One for details

10/18/04 Detail extended multiple times to 10/15/2005

Calendar Year 2005

Date

9/05/05 Announcement by Marc Schoem, Richard Stern, and members of team that Richard Stern would be appointed "acting" in the position previously occupied by Roy Deppa. Richard Stern received non-competitive temporary promotion to the GS-1801-15 position Associate Director position in place of Roy Deppa.

(Adverse Act- Denial of temporary promotion and opportunity to enhance skills, knowledge, and abilities)

9/30/05 Plaintiff Supervisor, Roy Deppa retires

10/12/05 Met with John Mullen and Marc Schoem. During meeting, plaintiff made clear her concerns about reprisals and returning to the Office of Compliance. She did not want to have to face any more acts of reprisal.

10/14/05 Detail to the Office of Secretary ends and next day Plaintiff assumes former duties and responsibilities.

(Adverse Act- Hostile work environment and reprisal)

12/15/05 Plaintiff submitted applications for two GS-1801-15 positions Associate Director positions in the Office of Compliance.

Calendar Year 2006

Date	
01/10/06	Plaintiff's requested training course at USDA Graduate School Washington Executive Seminar). She received no response received from management.
01/12/06	Request for training course at USDA Graduate School (Leading People). Was told by Richard Stern, ray name was "in the hat" for is type of training. No final response received. (Adverse Act - Denial of training and career advancement opportunities).
1/23/06	Schoem informed the Plaintiff of her non selection for both open positions for which she had applied; Plaintff was removed by Schoem her team leader duties and responsibilities. (Adverse Act - Denial of promotion and career advancement duties).
03/01/06	Plaintiff submitted a request for training course at USDA Graduate School. No response received from management as of April 20, 2006. (Adverse Act - Denial of truing and career advancement opportunities)
10/30/06	Put in a request to attend TAPE Conference on Amusement Rides in support of my work in that product area. 'Request denied with no reason provided. (Adverse Act Denial of training and career advancement opportunities)

7/31/07	Plaintiff is informed that she is the target of an informal investigation that call could lead to adverse actions.
08/20/07	"Close-out" annual performance rating lowered by Richard Stern without any explanation. Mr. Stern also included distortions of rating, and very negative career hindering narrative comments. (Adverse Act - Negating and limiting career advancement).